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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

JOHN PETTIT, DISTRICT ATTORNEY OF WASHINGTON COUNTY, PENNSYLVANIA,
Petitioner,

v.

FREDERICK A. BRILLA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2076

FREDERICK A. BRILLA

v.

JOHN PETTIT;
MICHAEL FAGELLA;
JOHN DOE, and;
JANE DOE, employees of the
District Attorneys Office of
Washington County,
Pennsylvania, and/or members
of the Washington County Drug
Task Force

John Pettit,

Appellant.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 98-1021)
District Judge: The Honorable Robert J. Cindrich

Submitted under Third Circuit LAR 34. 1 (a)
January 16, 2003

Before: ROTH, FUENTES and ALDISERT, Circuit Judges.

(Filed January 30, 2003)

OPINION OF THE COURT

ALDISERT, Circuit Judge.

John Pettit, District Attorney of Washington County, Pennsylvania, appeals a judgment entered on a jury verdict after a remittitur of punitive damages. He argues that the court erred in denying his motion for judgment as a matter of law on Frederick A. Brilla's claim brought under 42 U.S.C. § 1983.

Appellant contends that the court erred: (1) in determining that there was sufficient evidence for the jury to conclude that the district attorney deprived the plaintiff of his constitutional rights by failing to return property to him within a reasonable time; (2) in denying his motion for judgment as a matter of law with respect to punitive damage claims; (3) in abusing its discretion by failing to award a new trial on the issues of liability and punitive damages because the verdict was against the weight of the evidence; and (4) by failing to remit further the punitive damages award. The jury returned a verdict of $1 in compensatory damages and $100,000 in punitive damages. In granting a remittitur, the court reduced the punitive damages to $50,000.

Because the parties are familiar with the facts and the proceedings in the district court, we will discuss only the questions of law and will affirm.

We are satisfied that there was sufficient evidence upon which to sustain a judgment. Upon

Brilla's arrest, his property was seized and stored by the Pennsylvania State Police. While the property was stored, the Appellant personally paid storage fees for almost seven years, totaling $8,000. At the same time, Brilla had brought an action to retrieve his property, and the Washington County Court of Common Pleas granted the relief sought. The evidence is that the District Attorney's office received copies of all orders issued by the Clerk of Court. Nevertheless, Appellant, as the district attorney, refused to return the property including lawn furniture, tractors, a motorcycle and other items. Pettit concedes that the forfeiture action was resolved in Brilla's favor.

In addition to paying storage costs, Pettit personally directed the property's transfer from the state police storage facility to the county Jail and his own Drug Task Force office. The jury could certainly infer from Pettit's involvement - as an attorney, no less - that he should have known that a forfeiture proceeding could never take 11 years to come to fruition, and that at some point he should have questioned whether he was properly continuing to be the "stakeholder" of Brilla's property. His indifference to the issue of whether he was justified in keeping such property gave rise to the award of punitive damages.

We are satisfied that there was sufficient evidence to sustain the verdict in favor of Brilla and was not against the weight of the evidence as to require a new trial.

Pettit argues that although the district court reduced the punitive damages from $100,000 to $50,000, it erred by not reducing it to a lower amount. In BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), the Supreme Court established three guideposts to assist courts in

determining the reasonableness of a punitive damages award: (1) the degree of reprehensibility of the tortuous conduct; (2) the ratio of punitive damages to compensatory damages; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. 517 U.S. at 574-575. In Lee v. Edwards, 101 F.3d 805 (2nd Cir. 1996), our sister court concluded that these factors should assist the court in the application of the "shock the judicial conduct" standard. 101 F.3d at 809.

The District Court stated:

> Pettit's conduct, although found reprehensible by the jury, was not as blameworthy as wrongs we have seen in other civil rights cases. Moreover, the punitive damages awarded in other civil rights cases involving much more egregious conduct indicates that Brilla's award is excessive. That being said, the calculation of a suitable reduction is not an easy task. As the courts have recognized, the determination of a remittitur is not amenable to precise calculation. Based on our review of other civil rights cases, however, we believe that a remittitur of $50,000, for a total punitive damage award of $50,000, is appropriate. A substantial punitive damages award is warranted in this case in light of the important constitutional property night that was violated. We find, however, that $50,000 is the maximum punitive damage recovery that does not shock the judicial conscience.

App. at 16A. The court's decision on remittitur will not be disturbed absent a manifest abuse of discretion. Spence v. Bd. of Educ., 806 F.2d 1198, 1201 (3d Cir. 1986). We conclude that the district court did not exceed the bounds of a proper exercise of discretion.

* * * * *

We have considered all contentions of the parties and conclude that no further discussion is necessary.

The judgment of the district court will be affirmed.

/s/ Ruggero J. Aldisert
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2076

FREDERICK A. BRILLA

v.

JOHN PETTIT;
MICHAEL FAGELLA;
JOHN DOE, and;
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District Attorneys Office of
Washington County,
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District Judge: The Honorable Robert J. Cindrich

Submitted under Third Circuit LAR 34. 1 (a)
January 16, 2003

Before: ROTH, FUENTES and ALDISERT, Circuit Judges.

(Filed January 30, 2003)

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted on January 16, 2003.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the district court entered March 22, 2002, be and the same is hereby affirmed.

Costs taxed against the Appellant.

Attest:

/S/
Acting Clerk

DATED: January 30, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FREDERICK A. BRILLA,	)	
	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 98-1021
	)	
JOHN PETTIT, employee of Washington County District Attorneys' Office and/or member of Washington County Drug Task Force,	)	
	)	
	)	
	)	
	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

This civil rights action arose from the seizure of certain of plaintiff Frederick A. Brilla's property pursuant to his being arrested. Brilla alleged that defendant John Pettit, the Washington County District Attorney, unlawfully deprived him of the use of his property in violation of the Fourteenth Amendment to the United States Constitution because certain items of the property were never returned and other items were retained for an unreasonable period of time. After a four-day jury trial, the Jury found in favor of plaintiff and against defendant. and awarded plaintiff $1 in nominal damages and $100,000 in punitive damages.

Pending before the court is defendant's Motion for Judgment as a Matter of Law and/or a New Trial and Motion for Remittitur of Jury Verdict. (Doc. No. 44) and plaintiff's Motion for Attorney's

Fees and Costs (Doc. No. 46), which we address in turn.

I. Standard of Decision

A court may grant a renewed motion for judgment as a matter of law if "there is no legally sufficient evidentiary basis for a reasonable jury to find for," the prevailing party. Fed. R. Civ. P. 50(a)(1); 50(b). In analyzing a motion for judgment as a matter of law pursuant to Rule 50(b), the court must determine if the record is "critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) (citations omitted).

> Such a motion should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability. In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version. Although judgment as a matter of law should be granted sparingly, a scintilla of evidence is not enough to sustain a verdict of liability. "The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party."

Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993) (citations and quotation omitted).

A Rule 50 motion "should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993).

Such a motion may be joined with a motion under Rule 59 for a new trial, as plaintiff has done. Federal Rule of Civil Procedure 59 provides in pertinent part that "[a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any reasons for which new trials have heretofore been granted in actions at law in the courts in the United States...."[T]he district court's power to grant a new trial motion is limited to those circumstances 'where "a miscarriage of justice would result if the verdict were to stand.'" Olefins Trading, Inc. v. Han Yang Chem Corp., 9 F.3d 282, 289 (3d Cir. 1993) (citations omitted); see Greenleaf v. Garlock, Inc., 174 F.3d 352, 366 (3d Cir. 1999) ("[N]ew trials because the verdict is against the weight of the evidence are proper only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience." (quoting Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1353 (3d Cir. 1991)).

II. Defendant's Motion for Judgment as a Matter of Law And/or a New Trial and Motion for Remittitur of Jury

Pettit raises several arguments in support of his motion for judgment notwithstanding the verdict and/or a new trial and motion for remittitur of jury verdict which we address in turn.

A. Defendant's Motion for Judgment as a Matter of Law

Pettit argues that judgment as a matter of law should be granted with respect to the punitive damages award because there was no evidence that he personally acted with evil motive or callous or reckless disregard to Brilla's constitutional rights, or that one of his subordinates so acted.

As we properly instructed the jury, punitive damages may be awarded when a defendant deprives a plaintiff of a constitutionally protected right maliciously or in reckless or callous disregard of, or indifference to such protected right. It is not necessary, however, for the plaintiff to present direct evidence of malicious intent on the part of a defendant to justify an award of punitive damages. Intent may be inferred from the nature of the acts committed by the defendant and from the facts and circumstances surrounding such acts.

Pettit bases his motion on the same version of events that he argued to the jury. Pettit contends, for example, that the evidence does not support a finding that he acted maliciously or in reckless or callous disregard of, or indifference to Brilla's Constitutionally protected rights because the seizure of the property was initiated not by him but by the Pennsylvania State Police; that the subsequent forfeiture action was initiated not by him but by the Pennsylvania Attorney General's Office; that he never had possession, custody, or control over the property; that his involvement with the property was limited to preservation and

protection only; that he believed that he did not have the authority to release the property; that his office was not a party to the state court proceeding which resulted in the issuance of an April 1996 court order directing the return of Brilla's property; that he was unaware of the situation involving Brilla's property until the filing of the instant suit and that soon thereafter the suit was filed the property was returned; and that he had no personal or official motive for retaining the property.

Although we recognize that this is Pettit's version of events, there was evidence from which a jury reasonably could find that he acted in reckless or callous disregard of, or indifference to Brilla's property rights. As Brilla points out, there was compelling evidence that Pettit, although not responsible for the initial seizure of Brilla's property, was shortly thereafter in possession, custody and control of the property. For example, Pettit paid the $8,000 in storage fees to store the property for more than ten years; Pettit is the person everyone would go to regarding the transfer of the property; and Pettit is the one who decided where and when the property should be moved from storage.

There was also evidence which contradicted Pettit's claim that he was unaware of the situation involving Brilla's property. First, Pettit wrote the checks for the $8,000 in storage fees. Pettit also relinquished some of Brilla's property to a lienholder with whom he was personal friends soon after the seizure. There was also evidence discrediting Pettit's claimed lack of knowledge of the April 1996 order. One of Pettit's assistant district attorneys was ordered to appear at a hearing in connection with that order. Furthermore, Pettit's office customarily receives a copy of all court orders

filed with the Washington County Clerk of Courts that pertain to the return of property.

In addition, Pettit acknowledged that the only justification any one ever had for possessing Brilla's property was the original forfeiture action by the State Attorney General which was promptly dismissed. Thus, Brilla, as the rightful owner of the property, was entitled to its return within a reasonable period of time. The property was not returned until several years later, despite Brilla's several requests for its return and a court order directing the same. Moreover, even though Pettit claimed that the filing of the instant action brought the matter to his attention, the property was not returned until a substantial period after the suit was filed.

In sum, when viewing the evidence in a light most favorable to Brilla and giving him the advantage of every fair and reasonable inference, we cannot find that there was insufficient evidence from which a jury reasonably could find that Pettit acted with reckless or callous disregard of, or indifference to Brilla's constitutionally protected property rights.[1] Accordingly, Pettit's motion for judgment as a matter of law will be denied.

B. Defendant's Motion for a New Trial and Motion for Remittitur

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[1] Pettit provides neither argument nor analysis with regard to the nominal damages award. He states instead that even though his brief focuses on the punitive damages award, he is also entitled to judgment as a matter of law on the nominal damages award. We note that for the reasons set forth in our ruling on the punitive damages award, we also find that there is sufficient evidence from which a jury reasonably could find for Brilla on the issue of nominal damages.

1) Punitive Damages Award

Pettit argues that a new trial should be ordered because the punitive damages verdict is against the weight of the evidence.

As set forth in our analysis of the evidence in connection with the motion for judgment as a matter of law, we find that there is sufficient evidence from which a jury reasonably could find that Pettit acted with reckless or callous disregard of, or indifference to Brilla's constitutionally protected property rights. Thus, a miscarriage of justice would not result if the verdict is allowed to stand. Accordingly, we reject Pettit's argument that he is entitled to a new trial because the weight of the evidence does not support the punitive damages award.

2) Arguments by Opposing Counsel

Pettit argues that a new trial should be ordered because Brilla's counsel made certain prejudicial comments during the trial.

First, Pettit contends that counsel incorrectly argued that $52,565 in seized cash had been improperly retained by the District Attorney's Task Force when in fact that money had been properly applied to a fine imposed on Brilla. The court already ruled at trial that testimony and evidence regarding the disposition of this cash, which was seized along with all of the other property, was admissible. The disposition of the cash was so intertwined in the facts relating to the actual property at issue that evidence regarding the cash was, if nothing else, appropriate background information. Pettit's counsel was free to argue, and did, that the cash was not at issue in the case and

was properly administered. We find no prejudice to Pettit based on counsel's questions regarding the cash.

Next, Pettit contends that counsel improperly argued that the Washington County District Attorney's Office was a Commonwealth Agency. Pettit contends that the jury may have been confused that the District Attorney's Office, which he maintains is not a Commonwealth Agency, participated in the forfeiture proceeding which only involved the State Attorney General's Office. Pettit put this matter at issue as he argued during the trial that the April 1996 order did not apply to his office because the order was directed to Commonwealth agencies. Regardless of the wording of the April 1996 order, there was compelling evidence that the District Attorney's Office was in possession and control of Brilla's property and held it without lawful authority for an unreasonable length of time.

Finally, Pettit contends that counsel made repeated improper personal attacks on his character. Pettit does not specify what those comments were. Instead, he cites several pages of the transcript of counsel's closing argument. See Draper v. Airco, 580 F.2d 91, 97 (3d Cir. 1993) (Appropriate inquiry into whether counsel's comments during closing argument requires new trial is whether the closing contains "such numerous and serious violations of the rules of proper argument" that there is a reasonable probability that the verdict was influenced by the prejudicial statements.) A review of these pages reveals that with one exception Pettit made no objections to counsel's comments. Pettit cannot raise an objection now to a comment that he did not object to during trial. In any event, the comments appearing on these pages were proper argument as

to Pettit's credibility. See Def's App. (Doc. No. 62) pp. 627-29, 631-32, 658-59). Accordingly, we reject Pettit's argument that he is entitled to a new trial because of plaintiff's counsel's closing remarks.

3) Defendant's Motion for Remittitur

Pettit argues that the court should order a new trial because the $100,000 punitive damages award was excessive. Citing BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), Pettit argues in the alternative that the punitive damages award should be reduced because it was excessive.

A new trial may be ordered if a punitive damages award is "so grossly excessive as to shock the judicial conscience," Keenan v. City of Philadelphia, 983 F.2d 459, 472 (3d Cir. 1992), or indicates that the verdict resulted from passion or prejudice, Evans v. Port Authority of New York and New Jersey, 273 F.3d 346, 352 (3d Cir. 2001); Dunn v. Hovic, 1, F.3d 1371, 1382 (3d Cir. 1993). "[W]here the verdict is so large as to shock the conscience of the court . . . [the court may] order[] plaintiff to remit the portion of the verdict in excess of the maximum amount supportable by the evidence or, if the remittitur [is] refused, to submit to a new trial." Kazan v. Wolinski, 721 F.2d 911, 914 (3d Cir. 1983) (citing Perzoeproski v. American President Lines, Ltd., 319 F.Supp. 1329, 1330 (E.D. Pa. 1970)). Before ordering a remittitur, however, the court must conclude that the verdict was "so grossly excessive as to shock the judicial conscience." Gumbs v. Pueblo International, Inc., 823 F.2d 768, 771 (3d Cir. 1987). If the court determines that a remittitur is necessary, the amount "should be set at the maximum recovery, that does not shock the judicial conscience." Id. at 774 (citation omitted). However, "[t]he determination of that amount may not be precisely calculated." Id.

In Gore, the Supreme Court established three guideposts to assist the court in determining the reasonableness of a punitive damages award (1) the degree of reprehensibility of the tortious conduct; (2) the ratio of punitive damages to compensatory damages; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. 517 U.S. at 574-75. Although the Court of Appeals for the Third Circuit has not yet applied these guideposts in a Section 1983 case, the Court of Appeals for the Second Circuit has concluded that such factors should assist the court in the application of the "shock the judicial conscience" standard. See Lee v. Edwards, 101 F.3d 805, 809 n.2 (2d Cir. 1996) ("Although Gore examined the excessiveness of punitive damages awarded in a state court, the universal premise of the Supreme Court's due process reasoning suggests that the same considerations apply equally to the review of punitive damages in federal court." (citation omitted)); see also Garner v. Meoli, 19 F.Supp. 2d 378, 392 (1998) (civil rights case where court considered Gore when determining that remittitur of punitive damages award was not justified). We, like the Court of Appeals for the Second Circuit, believe that the Gore factors should guide our review of Brilla's punitive damages award.[2]

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[2] Although the Court of Appeals for the Third Circuit has not spoken on the applicability of the Gore guideposts in civil rights cases, the court recently applied a "shocks the Judicial conscience" analysis in a Section 1983/Title VII employment discrimination case which took similar factors into account. See Evans v. Port Authority of New York and New Jersey, 273 F.3d 346, 356 (3d Cir. 1991) ("We are convinced that in fixing the remittitur the District Court has endeavored to follow [our] instructions, consider similar cases, evaluate the evidence and determine a damages figure that [was] rationally related to [that] evidence,

The Supreme Court considered the reprehensibility of a defendant's conduct to be "[P]erhaps the most important indicium of the reasonableness of a punitive damages award . . . [noting that] some wrongs are more blameworthy than others." Gore, 517 U.S. at 575. The Court identified certain aggravating factors that differentiate some wrongs as being more reprehensible than others. Those factors include "(1) whether a defendant's conduct was violent or presented a threat of violence, (2) whether a defendant acted with deceit or malice as opposed to acting with mere negligence, and (3) whether a defendant has engaged in repeated instances of misconduct." Lee, 101 F.3d at 809 (citing Gore, 517 U.S. at 575-577). Pettit correctly points out that the instant case involved no acts of violence or threats of violence. Rather, the claims deal primarily with claimed lapses in the administration of seized property. Also, there was no evidence that Pettit had been charged with misconduct at any other time. Pettit's actions, however, as found by the jury, went beyond mere negligence. The evidence in this case, as described above, supports a finding that Pettit acted with reckless or callous disregard of, or indifference to Brilla's constitutionally protected property rights, conduct on equal footing with malice.

With regard to the ratio of punitive damages to compensatory damages, the Supreme Court explained that "the proper inquiry is whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that

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mindful that (t]he determination of that amount may not be precisely calculated." (quotations omitted)).

actually has occurred." Gore, 517 U.S. at 581 (citation omitted). The Court cautioned, however, that:

> low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

Id. at 582.

In Lee, the Court of Appeals for the Second Circuit concluded that this guidepost was not helpful in a civil rights case. Lee, 101 F.3d at 811. The Court explained that the Supreme Court's observations in Gore reinforce the rule that punitive damages may be awarded in a Section 1983 case even if compensatory damages are nominal, because "violations of civil rights may very well be 'particularly egregious' acts that result in only 'a small amount of economic damages' or injuries whose monetary value is 'difficult to determine.'" Lee, 101 F.3d at 811 (citing Gore, 517 U.S. at 582).

Thus, the 500 to 1 ratio calculated in Gore, a state tort action, should not create a benchmark for what is considered to be a fair ratio in a Section 1983 case. Lee, 101 F.3d at 811. Otherwise, "[b]ecause the compensatory award [in the civil rights case at issue] was nominal, **any** appreciable exemplary award would produce a ratio that would appear excessive . . . ." Id. (emphasis in original). We, like the Court of Appeals in Lee, find that a

comparative ratio would not be helpful in this civil rights case.[3]

As to a comparison of the punitive damages awarded here versus punitive damages awarded in comparable cases, Pettit accurately notes that there appears to be no reported federal cases involving facts similar to the instant case. However, Pettit cites several cases involving other civil rights violations. See Def's Br. (Doc. No. 61) pp. 12, 13 n.9 (citing cases). Pettit argues that a comparison to the punitive damages awarded in these cases indicates that Brilla's award is excessive. We agree. Even though the cases cited by Pettit involved conduct much more egregious than the civil rights violations at issue here, the amount of punitive damages awarded in those cases is on par with Brilla's award. See e.g., King v. Macri, 993 F.2d 294 (2d Cir. 1993) ($150,000 total punitive damages award against court security officers who repeatedly punched plaintiff after he was on the ground and maliciously prosecuted him causing him to be strip searched and placed in pretrial detention on Rikers Island for two months); Ismail v. Cohen, 899 F.2d 183, 186 (2d Cir. 1990) ($150,000 punitive damages award against police officer who beat plaintiff causing broken rib, two displaced vertebrae, and head injuries); O'Neill v. Krzeminski, 839 F.2d 9 (2d

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[3] We also note that because Pettit returned most of Brilla's property during the litigation, the economic harm in this case would have consisted almost entirely of the loss of use of the property for a closed period of time. The monetary value of such harm would be particularly difficult to calculate in this case given that the bulk of the property wrongfully withheld was two motorcycles that were apparently used for recreational purposes. Moreover, the few items that were never returned consisted of family photographs that would have been very difficult to put a price on, but undoubtedly were of great sentimental value to Brilla.

Cir. 1988) ($185,000 punitive damages award against police officers who struck plaintiff on the head while he was handcuffed and dragged him to a holding cell by the throat); Giroux v. Sherman, 807 F. Supp. 1182 (E.D. Pa. 1992) ($10,000 punitive damages award against prison guard who forced prisoner-plaintiff to walk to call from infirmary while he repeatedly struck plaintiff in the kidneys with a baton causing kidney and urinary tract injury).

In sum, we find based on the guideposts identified in Gore, that the punitive damages award in this case is excessive and should be reduced. Pettit's conduct, although found reprehensible by the jury, was not as blameworthy as wrongs we have seen in other civil rights cases. Moreover, the punitive damages awarded in other civil rights cases involving much more egregious conduct indicates that Brilla's award is excessive. That being said, the calculation of a suitable reduction is not an easy task. As the courts have recognized, the determination of a remittitur is not amenable to precise calculation. Based on our review of other civil rights cases, however, we believe that a remittitur of $50,000, for a total punitive damages award of $50,000, is appropriate. A substantial punitive damages award is warranted in this case in light of the important constitutional property right that was violated. We find, however, that $50,000 is the maximum punitive damages recovery that does not shock the judicial conscience.

Based on the foregoing reasons, Pettit's motion for a new trial will be denied and the motion for remittitur will be granted in the amount of $50,000.

III. Plaintiff's Motion for Attorney's Fees and Costs

A. Attorney's Fees

Brilla, as a prevailing party on his Section 1983 claim, moves for an award of attorney's fees pursuant to 42 U.S.C. Section 1988. He requests a total award of $18,750 in fees, consisting of 125 hours of attorney Joel Johnston's time at $150 per hour.

A prevailing party may, at the court's discretion, be entitled to the award of a reasonable attorney fee as part of the costs of the suit. 42 U.S.C. Section 1988. The Supreme Court has held, however, that "in the absence of special circumstances a district court not merely 'may' but must award fees to the prevailing plaintiff." Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 761 (1989)(citing Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1968)).

"The party seeking attorney's fees has the burden to prove that its request for attorney's fees is reasonable. To meet its burden, the fee petitioner must 'submit evidence supporting the hours worked and rates claimed.'" Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990)(quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). The burden then shifts to the opposing party to "challenge, by affidavit or brief with sufficient specificity to give fee applicants notice, the reasonableness of the requested fee." Id. at 1183 (citing Bell v. United Princeton Properties, Inc., 884 F.2d 713 (3d Cir. 1989)). The court may not "decrease a fee award based on factors not raised at all by the adverse party." Id. (citing Bell, 884 F.2d at 720). "Once the adverse party raises objections to the fee request, the district court has a great deal of discretion to adjust the fee award in light of those objections." Id. (citing Bell, 884 F.2d at 721) .

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley, 461 U.S. at 433. The result of this computation is called the lodestar and is "strongly presumed to yield a reasonable fee." Washington v. Philadelphia Co. Ct. of Common Pleas, 89 F.3d 1031, 1035 (3d Cir. 1996) (citing City of Burlington v. Dague, 505 U.S. 557 (1992)).

As to the number of hours, the court should exclude excessive, redundant or otherwise unnecessary hours as not "reasonably expended." Rode, 892 F.2d at 1183 (citing Hensley, 461 U.S. at 433). The court may also exclude hours spent litigating claims on which the party did not succeed and that were distinct in all respects from the claims on which it did succeed. Id. The court may also deduct hours that the party seeking fees has failed to adequately document. Id.

The hourly rate is calculated according to the prevailing market rate in the community. Id. (citing Blum v. Stenson, 465 U.S. 886, 895 (1984.). To do this, the court must assess the "experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Id.

Once the "lodestar" has been determined by multiplying rate times hours, the court may make certain adjustments. Id. The burden of persuasion is on the party seeking such an adjustment. The lodestar can be adjusted downward, for example, if it is not reasonable in light of the results obtained. Id. This general reduction accounts for time spent on unsuccessful claims related to the claim that

triggered the right to obtain fees and should be taken independently of any other adjustments. Id. Pettit argues that Brilla is not entitled to any award of attorney's fees because he did not recovery any compensatory damages. He argues in the alternative that even if the court determines that Brilla is entitled to an attorney's fee award, the hourly rate is improper and certain of the hours claimed are not recoverable.

1) **Entitlement to an Attorney's Fee Award**

Citing Farrar v. Hobby, 506 U.S. 103 (1992), Pettit argues that Brilla is not entitled to an attorney's fee award because he failed to recover any compensatory damages. The Supreme Court held as follows in Farrar:

> Although the "technical" nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under Section 1988. Once civil rights litigation materially alters the legal relationship between the parties, "the degree of the plaintiff's overall success goes to the reasonableness," of a fee award under Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). [Texas State Teachers Assn. v. Garland Independent School Dist., 489 U.S. 782, 793, 109 S.Ct. 1486, 1494 (1989)]. Indeed, "the most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained." Hensley, *supra*, 461 U.S., at 436, 103 S.Ct., at

1941. Accord, Marek v. Chesny, 473 U.S. 1, 11, 105 S.Ct. 3012, 3017, 87 L.Ed.2d 1 (1985). In this case, petitioners received nominal damages instead of the $17 million in compensatory damages that they sought. This litigation accomplished little beyond giving petitioners "the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated" in some unspecified way. [Hewitt v. Helms, 482 U.S. 755, 762, 107 S.Ct. 2672, 2676 (1987)]. . . . "Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." Riverside v. Rivera, 477 U.S. 561, 585, 106 S.Ct. 2686, 2700, 91 L.Ed.2d 466 (1986) (Powell, J., concurring in judgment). Such a comparison promotes the court's "central" responsibility to "make the assessment of what is a reasonable fee under the circumstances of the case." Blanchard v. Bergeron, 489 U.S. 87, 96, 109 S.Ct. 939, 946, 103 L.Ed.2d 67 (1989).

In some circumstances, even a plaintiff who formally "prevails" under Section 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. As we have held, a nominal damages award does render a plaintiff

a prevailing party by allowing him to vindicate his "absolute" right to procedural due process through enforcement of a judgment against the defendant. [Carey v. Piphus, 435 U.S. 247, 266, 98 S.Ct. 1042, 1053 (1978)]. In a civil rights suit for damages, however, the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable injury. Id., at 254-264, 98 S.Ct., at 1047-1052. Whatever the constitutional basis for substantive liability, damages awarded in a Section 1983 action "must always be designed 'to compensate injuries caused by the [constitutional] deprivation.'" [Memphis Community School Dist. v. Stachura, 477 U.S. 299, 309, 106 S.Ct. 2537, 2544 (1986) (quoting Carey, *supra*, 435 U.S., at 265, 98 S.Ct., at 1053) (emphasis and brackets in original). When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, see Carey, *supra*, at 256-257, 264, 98 S.Ct., at 1048-1049, 1052, the only reasonable fee is usually no fee at all. In an apparent failure to heed our admonition that fee awards under Section 1988 were never intended to "'produce windfalls to attorneys,'" Riverside v. Rivera, supra, 477 U.S., at 580, 106 S.Ct., at 2697 (plurality opinion) (quoting S.Rep. No. 94-1011, p. 6 (1976) U.S. Code Cong. & Admin. News 1976 pp. 5908, 5913). the District Court awarded $280,000 in attorney's fees without

> "consider[ing] the relationship between the extent of success and the amount of the fee award." Hensley, *supra*, 461 U.S., at 438, 103 S.Ct., at 1941.

506 U.S. at 114-116.

The plaintiff in Farrar sought $17 million in compensatory damages but only received a nominal damages award. Here, however, Brilla filed suit seeking injunctive relief for the return of his property and compensatory and punitive damages. Although the defendant returned Brilla's property prior to trial, which effectively mooted the issue of injunctive relief,[4] Brilla pursued compensatory and punitive damages through trial and obtained a significant punitive damages award. Thus, Brilla, unlike the plaintiff in Farrar, obtained much more than a "technical" nominal damages award.[5] Indeed,

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4 It appears that the filing of the instant suit is what finally prompted the defendant to return Brilla's property. It used to be that such occurrence could be considered part of Brilla's overall success under the "catalyst theory." See Baum Gartner v. Harrisburg Housing Authority, 21, F-3d 541 (3d Cir. 1994). In light of the Supreme Court's recent ruling in Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001), however, it appears that this is no longer the case. See 532 U.S. at 604, 610 (Only alterations of the legal relationships in the nature of enforceable judgments on the merits and court-ordered consent decrees create permit an award of attorney's fees. "[W]e hold that the "catalyst theory" is not a permissible basis for the award of attorney's fees . . . .")

5 Pettit contends that in Abrams v. Lightolier, Inc., 50 F.3d 1204 (3d Cir. 1995), the Court of Appeals for the Third Circuit interpreted Farrar as holding that a Federal civil rights plaintiff who obtains only nominal damages is not entitled to an attorney's fee award. Again, the instant case is distinguishable from Farrar because Brilla did not obtain only nominal damages. In any event, Pettit overstates the import of the Court of Appeals' comments in Abrams. The

the punitive damages award arising from this civil rights litigation has materially altered the legal relationship between the parties.[6] Also, when comparing the amount of total damages being sought in this case to the amount of total damages obtained, an attorney fee request in the range of that being sought here is not unreasonable and most certainly would not result in a windfall to Brilla's attorney.

Accordingly, we reject Pettit's argument that Brilla is not entitled to an attorney's fee award.

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plaintiff in Abrams was awarded $473,000 in compensatory damages and attorney's fees of $546,000. The defendant argued that the attorney fee award was improper under Farrar because it exceeded the damages award. The Court's discussion of Farrar was in response to this argument, which the Court ultimately held did not support the defendant's proportionality argument. Indeed, our research has uncovered no cases in the Court of Appeals for the Third Circuit or any other Circuit where Farrar has been interpreted as a bar to an attorney's fee award under facts similar to this case. To the contrary, the Court of Appeals for the Seventh and Eighth Circuits have taken into account the amount of compensatory and punitive damages sought versus the amount recovered. See Cartwright v. Stamper, 7 F.3d 106, 109 (7th Cir. 1993) ("[Plaintiffs here sought substantial compensatory and punitive damages and recovered only nominal damages . . . ."); Jones v. A.L. Lockhart, 29 F.3d 422, 424 (8th Cir. 1994) ("Most importantly, Jones was awarded punitive damages.")

6 Pettit contends that a punitive damages award is not the type of recovery that justifies an attorney's fee award because such awards do little to advance the basic purpose of Section 1983 which is to compensate persons for injuries caused by the deprivation of constitutional rights. We disagree. Although compensation for injuries is important, a significant if not equally important purpose of Section 1983 is to punish defendants that deprive a plaintiff of his or her Constitutional rights maliciously or in reckless or callous disregard of such rights and to warn others against doing the same.

2) Lodestar Calculation

Brilla submitted invoices in support of the fees requested which details the 125 hours attorney Johnston spent working on the case. We note at the outset that based on our experience in reviewing dozens of fee requests, the total hours expended was imminently reasonable. In fact, it is far lower than that we typically see, especially in cases that have been tried to verdict before a jury. We will first address Pettit's objections to the requested hourly rate.

a) Hourly Rate

Pettit contends the hourly rate should be limited to $125 which is the actual rate he was charged by Johnston. Brilla maintains that even though $125 was the actual hourly rate charged, a $150 hourly rate represents the prevailing market rate in the Pittsburgh area for attorneys with Johnston's level of skill and years of experience. Brilla further maintains that the hourly rate should be adjusted upward to $150 because Johnston will be treated unfairly by the Washington County District Attorney's Office henceforth, and therefore he will be unable to accept future criminal cases in that county.

Brilla submitted several affidavits from local practitioners wherein they state that the hourly rates they charge range from $150 to $225. See Pl's Fee Mot. (Doc. No. 46) and Pl's Supp. Mot. (Doc. No. 54). Also attached to the petition is an affidavit by Johnston wherein he claims that his hourly rate ranges between $125 to $150 and is $125 in federal criminal cases. Pl's Supp. Mot. Ex. F. Although this evidence supports Johnston's range of rates, the actual $125 hourly rate charged is a better measure of the prevailing market rate for Johnston's services

in this case. Indeed, Johnston does not give any specifics on what types and how many cases he commands his top hourly rate of $150. In comparison, he avers that $125 is his rate in criminal cases before this court.

Also, we disagree with Brilla's argument that the hourly rate should be adjusted upward to $150 because of the potential negative affect the case will have on Johnston's ability to take criminal cases in Washington County. Johnston's subjective belief that he will be treated unfairly by the Washington County District Attorney's Office, without more, does not justify an upward adjustment. As Pettit points out, the favorable publicity generated by the results obtained in this case may have the opposite affect on Johnston's practice. Moreover, Brilla supposedly came to Johnston because he could not find an attorney in Washington County willing to take the case. Thus, it is a fair assumption that the $125 rate set by Johnston already takes into account the undesirability of the case.

Accordingly, we find that an hourly rate of $125 is the prevailing market rate for Johnston's services in this case.

b) Hours

Pettit argues that attorney's fees should not be awarded for time spent performing clerical type duties. Pettit does not cite any specific entry on Brilla's supporting invoices that fall into this category, but instead quotes the description of such charges as follows: i) "travel Washington to file motion to reconsider; serve same on Judge and DA"; ii) "travel to federal court to file complaint"; iii) "travel to Canonsburg to pick-up client and deliver subpoena to Ronald Levi."

Time for activities that are more effectively and economically performed by non-lawyers should not be awarded at an attorney rate. Moreover, the costs for clerical work, such as filing and copying, are ordinarily included in an attorney's rate as office overhead. The charges Pettit refers to fall within this category. Thus, the following charges will be excluded from the lodestar calculation:

1.75 hours:	(For travel to Washington to file motion and serve on Judge and DA on 4/13/98)
.25 hours:	(Estimate of .25 hours of total .75 hours on 6/11/98 for serving complaint by mail. Remaining .50 hours allowed for preparation of civil cover sheet, notice of suit and waiver of summons.)
1.75 hours:	(Estimate of 1.75 hours of total 3.50 hours on 6/10/01 for travel to Canonsburg to pick-up client and deliver subpoena to Ronald Levi. Remaining 1.75 hours allowed for computer research to locate Levi and prepare subpoenas.)

Pl's Mot. (Doc. No. 46) Ex. A.[7]

Accordingly, we calculate the lodestar as 121.25 total hours (125 total requested hours - 3.75

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[7] Although Pettit did not provide a cite for these charges, we were able to identify them based on his descriptions.

excluded hours) times $125, for a total lodestar amount of $15,156.25.

c) Downward Adjustments

Pettit argues that any fee award should be reduced by the number of hours Brilla spent prosecuting unsuccessful claims. In Hensley, the Supreme Court "established certain principles to guide the discretion of the lower courts in setting fee awards in cases where plaintiffs have not achieved complete success." Texas State Teachers Assoc. v. Garland Independent Sch. Dist., 489 U.S. 782, 789 (1989). The Court later summarized these principles in Texas State explaining that

> [w]here the plaintiff's claims are based on different facts and legal theories, and the plaintiff has prevailed on only some of those claims, we indicated that "[t]he congressional intent to limit [fee] awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." Hensley, 461 U.S. at 435. In the more typical situation, where the plaintiff's claims arise out of a common core of facts, and involve related legal theories, the inquiry is more complex. In such a case, we indicated that "the most critical factor is the degree of success obtained." 461 U.S. at 436. We noted that in complex civil rights litigation, "the plaintiff often may succeed in identifying some unlawful practices or conditions," but that "the range of possible success is vast," and the

> achievement of prevailing party status alone "may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." Id. We indicated that the district courts should exercise their equitable discretion in such cases to arrive at a reasonable fee award, either by attempting to identify specific hours that should be eliminated or by simply reducing the award to account for the limited success of the plaintiff. Id. at 437.

489 U.S. at 789-790.

The instant case is the more typical situation, as Brilla's claims arose out of a common core of facts and involved related legal theories. Thus, the critical factor to examine is Brilla's degree of success.[8] As previously noted, Brilla filed this action seeking the return of his property and compensatory and punitive damages for its

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8 In Hensley, the Court identified the following twelve factors to guide the lower court's determination: the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal service properly; the preclusion of employment by the attorney due to acceptance of the case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the amount involved and results obtained; the experience, reputation, and ability of the attorneys; the undesirability of the case; the nature and length of the professional relationship with the client and awards in similar cases. Hensley, 461 U.S. at 430 n.3 (citations omitted). The Court further noted, however, that "many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." Id. at 434 n.9 (citations omitted). Again, the results obtained is the "particularly crucial" factor and is what our consideration focuses on. Id. at 434.

wrongful withholding. The filing of the this suit prompted the return of the property and resulted in a substantial punitive damages award. Thus, Brilla achieved considerable success in this case.

We also note that Brilla's somewhat broadly stated complaint was not improper given the dearth of case law dealing with the peculiar facts at issue. The legal theories were quickly refined, however, and focused on the constitutional claim ultimately submitted to the jury. Indeed, based on our experience with the case, having presided over it since its filing, and review of the supporting invoices we find that the total hours spent on the case by attorney Johnston are within a reasonable range and were not significantly increased, if at all, by pursuing any legal claim that did not make it the jury. Thus, we reject Pettit's argument that the fee award should be adjusted downward.

Accordingly, Brilla's motion for attorney's fees will be granted in the amount of $15,156.25, which we find to be a reasonable fee that is supported by the evidence.

B. Costs

Brilla also moves pursuant to Fed. R. Civ. P. 54(d)(1) for an award of Costs of $509.23.

Federal Rule of Civil Procedure 54(d)(1) provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . ." The definition of allowable costs is set forth at 28 U.S.C. Section 1920 which defines such costs as:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. Section 1920; Crawford Fitting Company v. J.T. Gibbons, Inc., 482 U.S. 437, 443 (1987) ("Section 1920 defines the term 'costs' as used in Rule 54(d)").

Our review of the supporting invoices indicates that the requested costs fall in these categories of recoverable costs.[9] Accordingly, Brilla' motion for an award of $509.23 in costs will be granted.

For the foregoing reasons, **IT IS HEREBY ORDERED** that:

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[9] The only objection by Pettit to the requested costs is a conclusory allegation that there "are expenses for the attendance of witnesses that apparently did not testify at trial." Def's Resp. (Doc. No. 53) p. 11. Pettit does not, however, cite any specific entry on Brilla's supporting invoices for these costs or identify who these witnesses are.

- The defendant's motion for judgment as a matter of law and/or a new trial (Doc. No. 44) is **DENIED.**

- The defendant's motion for remittitur of the $100,000 punitive damages award (Doc. No. 44) is **GRANTED in the amount of $50,000.** Thus, unless plaintiff files a remittitur of punitive damages in excess of $50,000 within twenty days of the date of this memorandum order, a new trial on the issue of punitive damages will be ordered.

- The plaintiff's motion for attorney's fees and costs (Doc. No. 46) is **GRANTED** in the amount of $15,156.25 for attorney's fees and $509.23 in costs for a total award of $15,665.48 in attorney's fees and costs.

SO ORDERED this 20th day of March, 2002.

/S/
Robert J. Cindrich
United States District Judge

cc:

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PURDON'S PENNSYLVANIA STATUTES AND CONSOLIDATED STATUTES ANNOTATED
PURDON'S PENNSYLVANIA CONSOLIDATED STATUTES ANNOTATED
TITLE 42. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. ACTIONS, PROCEEDINGS AND OTHER MATTERS GENERALLY
CHAPTER 68. CONTROLLED SUBSTANCES FORFEITURES

Current through Act 2002-55

§ 6801. Loss of property rights to Commonwealth

(a) Forfeitures generally. The following shall be subject to forfeiture to the Commonwealth and no property right shall exist in them:

(1) All drug paraphernalia, controlled substances or other drugs which have been manufactured, distributed, dispensed or acquired in violation of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act.

(2) All raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing or exporting any controlled substance or other drug in violation of The Controlled Substance, Drug, Device and Cosmetic Act.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles or vessels, which are used or are intended for use to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of, property described in paragraph (1) or (2), except that:

(i) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of The Controlled Substance, Drug, Device and Cosmetic Act;

(ii) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent, which absence of knowledge or consent must be reasonable under the circumstances presented;

(iii) no bona fide security interest retained or acquired under 13 Pa.C.S. (relating to commercial code) by any merchant dealing in new or used aircraft, vehicles or vessels, or retained or acquired by any licensed or regulated finance company, bank or lending institution, or by any other business regularly engaged in the financing of, or lending on the security of, such aircraft, vehicles or vessels, shall be subject to forfeiture or impairment; and

(iv) no conveyance shall be forfeited under this section for violation of section 13(a)(31) of The Controlled Substance, Drug, Device and Cosmetic Act.

(5) All books, records and research, including formulas, microfilm, tapes and data, which are used or intended for use in violation of The Controlled Substance, Drug, Device and Cosmetic Act.

(6)(i) All of the following:

(A) Money, negotiable instruments, securities or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act, and all proceeds traceable to such an exchange.

(B) Money, negotiable instruments, securities or other things of value used or intended to be used to facilitate any violation of The Controlled Substance, Drug, Device and Cosmetic Act.

(C) Real property used or intended to be used to facilitate any violation of The Controlled Substance, Drug, Device and Cosmetic Act, including structures or other improvements thereon, and including any right, title and interest in the whole or any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used,

in any manner or part, to commit, or to facilitate the commission of, a violation of The Controlled Substance, Drug, Device and Cosmetic Act, and things growing on, affixed to and found in the land.

(ii) No property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by the owner to have been committed or omitted without the knowledge or consent of that owner. Such money and negotiable instruments found in close proximity to controlled substances possessed in violation of The Controlled Substance, Drug, Device and Cosmetic Act shall be rebuttably presumed to be proceeds derived from the selling of a controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act.

(iii) No valid lien or encumbrance on real property shall be subject to forfeiture or impairment under this paragraph. A lien which is fraudulent or intended to avoid forfeiture under this section shall be invalid.

(7) Any firearms, including, but not limited to, rifles, shotguns, pistols, revolvers, machine guns, zip guns or any type of prohibited offensive weapon, as that term is defined in 18 Pa.C.S. (relating to crimes and offenses), which are used or intended for use to facilitate a violation of The Controlled Substance, Drug, Device and Cosmetic Act. Such operable firearms as are found in close proximity to illegally possessed controlled substances shall be rebuttably presumed to be used or intended for use to facilitate a violation of The

Controlled Substance, Drug, Device and Cosmetic Act. All weapons forfeited under this section shall be immediately destroyed by the receiving law enforcement agency.

(b) Process and seizure. Property subject to forfeiture under this chapter may be seized by the law enforcement authority upon process issued by any court of common pleas having jurisdiction over the property. Seizure without process may be made if:

(1) the seizure is incident to an arrest or a search under a search warrant or inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the Commonwealth in a criminal injunction or forfeiture proceeding under this chapter;

(3) there is probable cause to believe that the property is dangerous to health or safety; or

(4) there is probable cause to believe that the property has been used or is intended to be used in violation of The Controlled Substance, Drug, Device and Cosmetic Act.

(c) Seizure without process. In the event seizure without process occurs, as provided herein, proceedings for the issuance thereof shall be instituted forthwith.

(d) Custody of property. Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the law enforcement authority subject only to the

orders and decrees of the court of common pleas having jurisdiction over the forfeiture proceedings and of the district attorney or the Attorney General. When property is seized under this chapter, the law enforcement authority shall place the property under seal and either:

(1) remove the property to a place designated by it; or

(2) require that the district attorney or Attorney General take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(e) Use of property held in custody. Whenever property is forfeited under this chapter, the property shall be transferred to the custody of the district attorney, if the law enforcement authority seizing the property has local or county jurisdiction, or the Attorney General, if the law enforcement authority seizing the property has Statewide jurisdiction. The district attorney or the Attorney General, where appropriate, may:

(1) Retain the property for official use.

(2) Sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public, but the proceeds from any such sale shall be used to pay all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising and court costs. The balance of the proceeds shall be dealt with in accordance with subsections (f) and (g).

(f) Use of cash or proceeds of property. Cash or proceeds of forfeited property transferred to the custody of the district attorney pursuant to subsection (e) shall be placed in the operating fund of the county in which the district attorney is elected. The appropriate county authority shall immediately release from the operating fund, without restriction, a like amount for the use of the district attorney enforcing the provisions of The Controlled Substance, Drug, Device and Cosmetic Act. The entity having budgetary control shall not anticipate future forfeitures or proceeds therefrom in adoption and approval of the budget for the district attorney.

(g) Distribution of property among law enforcement authorities. If both municipal and State law enforcement authorities were substantially involved in effecting the seizure, the court having jurisdiction over the forfeiture proceedings shall equitably distribute the property between the district attorney and the Attorney General.

(h) Authorization to utilize property. The district attorney and the Attorney General shall utilize forfeited property, or proceeds thereof for the purpose of enforcing the provisions of The Controlled Substance, Drug, Device and Cosmetic Act. In appropriate cases, the district attorney and the Attorney General may designate proceeds from forfeited property to be utilized by community-based drug and crime-fighting programs and for relocation and protection of witnesses in criminal cases.

(i) Annual audit of forfeited property. It shall be the responsibility of every county in this Commonwealth to provide, through the controller, board of auditors or other appropriate auditor and the district attorney, an annual audit of all forfeited

property and proceeds obtained under this section. The audit shall not be made public but shall be submitted to the Office of Attorney General. The county shall report all forfeited property and proceeds obtained under this section and the disposition thereof to the Attorney General by September 30 of each year.

(j) Annual report; confidential information regarding property. The Attorney General shall annually submit a report, to the Appropriations and Judiciary Committees of the Senate and to the Appropriations and Judiciary Committees of the House of Representatives, specifying the forfeited property or proceeds thereof obtained under this section. The report shall give an accounting of all proceeds derived from the sale of forfeited property and the use made of unsold forfeited property. The Attorney General shall adopt procedures and guidelines governing the release of information by the district attorney to protect the confidentiality of forfeited property or proceeds used in ongoing drug enforcement activities.

(k) Proceeds and appropriations. The proceeds or future proceeds from forfeited property under this chapter shall be in addition to any appropriation made to the Office of Attorney General.